

IN THE UNITED STATES DISTRICT COURT  
EASTERN DISTRICT OF MICHIGAN  
SOUTHERN DIVISION

LEAGUE OF WOMEN VOTERS  
OF MICHIGAN, et al.,

Plaintiffs,

Civil Action No. 17-cv-14148

v.

RUTH JOHNSON, in her official  
capacity as Michigan Secretary of State

Hon. Eric L. Clay  
Hon. Denise Page Hood  
Hon. Gordon J. Quist

Defendant.

---

**CONGRESSIONAL AND LEGISLATIVE DEFENDANTS-INTERVENORS’  
EX PARTE MOTION FOR EXPEDITED  
BRIEFING ON EMERGENCY MOTION TO STAY TRIAL**

The Congressional and Legislative Defendants-Intervenors, by and through their attorneys, respectfully move this Court to order expedited briefing on their simultaneously-filed Emergency Motion To Stay Trial (“Emergency Motion”) pending the final decisions of the United States Supreme Court in *Common Cause v. Rucho* (Sup. Ct. #18-422) and *Benisek v. Lamone* (Sup. Ct. 18-726). Specifically, Defendants-Intervenors request the Court order any response to the Emergency Motion be filed within 3 days after the Court enters an order on this motion and any reply be filed within 1 day thereafter.

In support of this motion, the Defendants-Intervenors rely on the facts, law,

and argument set forth in their accompanying Brief in Support. The undersigned counsel sought concurrence to the relief requested in this motion prior to filing. Both counsel for Plaintiffs and counsel for Defendant Secretary of State concur with the specific briefing schedule requested in this motion.

WHEREFORE, the Congressional and Legislative Defendants-Intervenors respectfully request the Court grant their motion and order expedited briefing on their simultaneously-filed Emergency Motion To Stay Trial pending the final decisions of the United States Supreme Court in *Common Cause v. Rucho* (Sup. Ct. #18-422) and *Benisek v. Lamone* (Sup. Ct. 18-726).

Respectfully submitted,

**Holtzman Vogel Josefiak  
Torchinsky PLLC**

/s/ Jason Torchinsky  
Jason Torchinsky  
Shawn Sheehy  
Phillip Gordon  
45 North Hill Drive, S 100  
Warrenton, Virginia 20106  
(540) 341-8800  
JTorchinsky@hvjt.law  
ssheehy@hvjt.law  
pgordon@hvjt.law  
Attorneys for Applicants

**Clark Hill PLC**

/s/ Brian D. Shekell  
Charles R. Spies  
Brian D. Shekell (P75327)  
212 E. Cesar Chavez Ave.  
Lansing, MI 48906  
(517) 318-3100  
cspies@clarkhill.com  
bshekell@clarkhill.com  
Attorneys for Applicants

Date: January 11, 2019

IN THE UNITED STATES DISTRICT COURT  
EASTERN DISTRICT OF MICHIGAN  
SOUTHERN DIVISION

LEAGUE OF WOMEN VOTERS  
OF MICHIGAN, et al.,

Plaintiffs,

Civil Action No. 17-cv-14148

v.

Hon. Eric L. Clay  
Hon. Denise Page Hood  
Hon. Gordon J. Quist

RUTH JOHNSON, in her official  
capacity as Michigan Secretary of State

Defendant.

---

**BRIEF IN SUPPORT OF *EX PARTE* MOTION FOR EXPEDITED  
BRIEFING ON CONGRESSIONAL & LEGISLATIVE DEFENDANTS-  
INTERVENORS' EMERGENCY MOTION TO STAY TRIAL**

**CONCISE STATEMENT OF THE ISSUE PRESENTED**

WHETHER THE COURT SHOULD ORDER EXPEDITED BRIEFING ON DEFENDANTS-INTERVENORS' EMERGENCY MOTION TO STAY TRIAL OF THIS CASE WHERE

1) ABSENT EXPEDITED BRIEFING, THE EMERGENCY MOTION MAY NOT BECOME RIPE FOR A DECISION UNTIL FEBRUARY 1, 2019, ONLY DAYS BEFORE THE FEBRUARY 5, 2019, START OF TRIAL; AND,

2) GOOD CAUSE EXISTS TO GRANT THE EMERGENCY MOTION IN LIGHT OF THE IMPENDING TRIAL DATE.

Movant's answer: Yes

Plaintiffs' answer: Yes

Defendant Secretary of State's Answer: Yes

This Court should answer: Yes

## **CONTROLLING OR MOST APPROPRIATE AUTHORITY**

### **Rules**

Federal Rule of Civil Procedure 6(c)(1)(C)

### **Cases**

*Cooey v. Strickland*, No. 2:04-CV-1156, 2011 WL 320166, at \*1 (S.D. Ohio Jan. 28, 2011)

*Galloway v. Chesapeake Union Exempted Vill. Sch. Bd. of Educ.*, No. 1:11-CV-850, 2014 WL 5460538 (S.D. Ohio Oct. 27, 2014)

*Nartron Corp. v. Tuthill Corp.*, No. 05-70323, 2006 WL 2042609 (E.D. Mich. July 20, 2006)

*Sabol-Krutz v. Quad Elecs., Inc.*, No. 2:15-CV-13328, 2016 WL 6277083 (E.D. Mich. Oct. 27, 2016)

Trial is set to begin in this matter on February 5, 2019. (ECF No. 140). However, Defendants-Intervenors have filed an Emergency Motion to Stay Trial (“Emergency Motion”) based upon the pending Supreme Court decisions in *Common Cause v. Rucho* (Sup. Ct. #18-422) and *Benisek v. Lamone* (Sup. Ct. #18-726). As described in the Emergency Motion, in *Rucho* and *Benisek* the Supreme Court will resolve currently unanswered questions regarding the justiciability, legal standards, factual questions and appropriate remedy in political gerrymandering claims.

Put another way, the Supreme Court’s decisions in *Rucho* and *Benisek* will determine whether this lawsuit should be dismissed, thereby completely obviating the need for trial, or, alternatively, will determine the legal principles to be applied to this case and the appropriate factual questions to be resolved at trial. If the Court is inclined to grant the Emergency Motion—and Defendants-Intervenors believe it should—then an expedited briefing schedule will allow the Court to make a decision sooner and thereby relieve the Parties and the Court of the unnecessary expenditure of time and resources to prepare for trial given that the standard briefing schedule would not expire until the eve of trial.

Under the briefing schedule provided for by Eastern District of Michigan Local Rule 7.1(e)(2), the Emergency Motion would typically not become ripe for a decision until 21 days after its filing, or February 1, 2019. This means the motion

would ordinarily not be decided until, at the earliest, four days before trial is set to begin in this matter. The Parties, in that scenario, would have no choice but to complete all trial preparations before the motion is ripe for a decision by the Court.

Federal Rule of Civil Procedure 6(c)(1)(1), provides the Court with authority to resolve the Emergency Motion sooner.

(1) In General. A written motion and notice of the hearing must be served at least 14 days before the time specified for the hearing, with the following exceptions:

...

(C) when a court order--which a party may, for good cause, apply for ex parte--sets a different time.

Such good cause is shown where a time constraint exists due to an impending trial date. *See Galloway v. Chesapeake Union Exempted Vill. Sch. Bd. of Educ.*, No. 1:11-CV-850, 2014 WL 5460538, at \*8 (S.D. Ohio Oct. 27, 2014) (setting four day briefing schedule on motion *in limine* where trial was set to begin in two weeks); *Cooey v. Strickland*, No. 2:04-CV-1156, 2011 WL 320166, at \*1 (S.D. Ohio Jan. 28, 2011) (noting expedited briefing on a motion had been ordered in light of an impending trial date); *Nartron Corp. v. Tuthill Corp.*, No. 05-70323, 2006 WL 2042609, at \*1 (E.D. Mich. July 20, 2006) (noting expedited briefing was ordered to allow resolution of a motion prior to jury selection); *see also Sabol-Krutz v. Quad Elecs., Inc.*, No. 2:15-CV-13328, 2016 WL 6277083, at \*1 (E.D.

Mich. Oct. 27, 2016) (noting expedited briefing on a motion was ordered as a result of “time sensitive issues”).

Good cause exists in the instant cause due to time constraints imposed by the impending trial date. Moreover, Defendants-Intervenors filed this motion in a timely fashion after the Supreme Court recently announced that, in March of 2019, it will consider dispositive issues associated with the gerrymandering claims at issue in this lawsuit.

### **CONCLUSION**

For the foregoing reasons, the Congressional and Legislative Defendants-Intervenors respectfully request the Court grant the motion and order expedited briefing on the simultaneously-filed Emergency Motion To Stay Trial pending the final decisions of the United States Supreme Court in *Common Cause v. Rucho* (Sup. Ct. #18-422) and *Benisek v. Lamone* (Sup. Ct. 18-726).

**Holtzman Vogel Josefiak  
Torchinsky PLLC**

/s/ Jason Torchinsky  
Jason Torchinsky  
Shawn Sheehy  
Phillip Gordon  
45 North Hill Drive, S 100  
Warrenton, Virginia 20106  
(540) 341-8800  
JTorchinsky@hvjt.law  
ssheehy@hvjt.law  
pgordon@hvjt.law

**Clark Hill PLC**

/s/ Brian D. Shekell  
Charles R. Spies  
Brian D. Shekell (P75327)  
212 E. Cesar Chavez Ave.  
Lansing, MI 48906  
(517) 318-3100  
cspies@clarkhill.com  
bshekell@clarkhill.com  
Attorneys for Defendants-Intervenors



Attorneys for Defendants-Intervenors

Date: January 11, 2019

**CERTIFICATE OF SERVICE**

I hereby certify that on January 11, 2019, I electronically filed the foregoing paper with the Clerk of the Court using the ECF system which will send notification of such filing to all of the parties of record.

**CLARK HILL PLC**

/s/ Brian D. Shekell

UNITED STATES DISTRICT COURT  
EASTERN DISTRICT OF MICHIGAN  
SOUTHERN DIVISION

LEAGUE OF WOMEN VOTERS  
OF MICHIGAN, et al.,

OF MICHIGAN, et al.,

Case No. 2:17-cv-14148

Plaintiffs,

Hon. Eric L. Clay

Hon. Denise Page Hood

V.

Hon. Gordon J. Quist

JOCELYN BENSON, in her official  
Capacity as Michigan  
Secretary of State, et al.,

# Capacity as Michigan

Secretary of State, et al.,

Defendants.

**PLAINTIFFS' RESPONSE TO  
CONGRESSIONAL AND  
LEGISLATIVE DEFENDANTS-  
INTERVENORS' EMERGENCY  
MOTION TO STAY TRIAL**

Joseph H. Yeager, Jr. (IN 2083-49)  
Kevin M. Toner (IN 11343-49)  
Harmony A. Mappes (IN 27237-49)  
Jeffrey P. Justman (MN 390413)  
Daniel R. Kelley (IN 30706-49)  
Matthew K. Giffin (IN 31603-49)  
Irina Vaynerman (MN 0396759)  
FAEGRE BAKER DANIELS LLP  
300 North Meridian Street, Suite 2700  
Indianapolis, IN 46204  
Telephone: 317-237-0300  
[Jay.Yeager@FaegreBD.com](mailto:Jay.Yeager@FaegreBD.com)  
[Kevin.Toner@FaegreBD.com](mailto:Kevin.Toner@FaegreBD.com)  
[Harmony.Mappes@FaegreBD.com](mailto:Harmony.Mappes@FaegreBD.com)  
[Jeff.Justman@FaegreBD.com](mailto:Jeff.Justman@FaegreBD.com)  
[Daniel.Kelley@FaegreBD.com](mailto:Daniel.Kelley@FaegreBD.com)  
[Matt.Giffin@FaegreBD.com](mailto:Matt.Giffin@FaegreBD.com)  
[Irina Vaynerman@FaegreBD.com](mailto:Irina.Vaynerman@FaegreBD.com)

Mark Brewer (P35661)  
GOODMAN ACKER P.C.  
17000 West Ten Mile, Second Floor  
Southfield, MI 48075  
Telephone: 248-483-5000  
[MBrewer@goodmanacker.com](mailto:MBrewer@goodmanacker.com)

## Counsel for Voters

**PLAINTIFFS' RESPONSE TO CONGRESSIONAL  
AND LEGISLATIVE DEFENDANTS-INTERVENORS'  
EMERGENCY MOTION TO STAY TRIAL**

Plaintiffs agree that the trial of this action, and all pretrial deadlines, should be continued. Plaintiffs support the continuance not for the reasons set forth in Congressional and Legislative Defendants-Intervenors' Emergency Motion to Stay Trial (ECF 183), but because of the high likelihood that the Secretary of State and Plaintiffs will soon reach a settlement of the issues in this case.

1. Plaintiffs and the Secretary ("Parties") have been discussing compromise resolution of this action. The Parties have discussed a structure for the settlement.

2. Both Parties have committed to reach a compromise and present it to the Court for approval. Though the Parties have not committed to a specific deadline, Plaintiffs anticipate that final terms will be concluded and the matter presented to the Court in the near future.

3. On January 10, 2018, the undersigned counsel notified Intervenors' counsel of the beginning of a settlement discussion and asked whether Intervenors were interested in a settlement. They have not chosen to participate in the discussion.

4. If the settlement is concluded in time, Plaintiffs will ask the Court to set a hearing on the proposed consent decree on February 5, 2019, or as soon thereafter as the Court's schedule allows.

5. Should the Court approve the proposed consent decree, the trial will not be necessary. The proposed decree will resolve all claims pending in this matter.

6. At least one significant motion is pending that will become moot if the Court approves a consent decree: Voters' Motion for Determination of the Existence of Privilege Claims under F.R.E. 104 (ECF 150). Voters respectfully ask the Court to hold this and all other pretrial motions and deadlines in abeyance until the Court decides Plaintiffs' and the Secretary's motion to approve a consent decree.

WHEREFORE, to allow reasonable and adequate time to complete the consent decree process and to avoid burdening the Court and the parties with further trial preparations under these circumstances, Plaintiffs respectfully ask the Court to continue the trial of this matter and all pending deadlines indefinitely pursuant to LR 40.2, and hold pending motions in abeyance.

Respectfully submitted,

Date: January 17, 2019

/s/ Joseph H. Yeager, Jr.

Mark Brewer (P35661)  
GOODMAN ACKER P.C.  
17000 West Ten Mile, Second Floor  
Southfield, MI 48075  
Telephone: (248) 483-5000  
[MBrewer@goodmanacker.com](mailto:MBrewer@goodmanacker.com)

Joseph H. Yeager, Jr. (IN Bar No. 2083-49)  
Kevin M. Toner (IN Bar No. 11343-49)  
Harmony A. Mappes (IN Bar No. 27237-49)  
Jeffrey P. Justman (MN Bar No. 390413)  
Daniel R. Kelley (IN 30706-49)  
Matthew K. Giffin (IN 31603-49)  
Irina Vaynerman (MN 0396759)  
FAEGRE BAKER DANIELS LLP  
300 North Meridian Street, Suite 2700  
Indianapolis, IN 46204  
Telephone: (317) 237-0300  
[Jay.Yeager@FaegreBD.com](mailto:Jay.Yeager@FaegreBD.com)  
[Kevin.Toner@FaegreBD.com](mailto:Kevin.Toner@FaegreBD.com)  
[Harmony.Mappes@FaegreBD.com](mailto:Harmony.Mappes@FaegreBD.com)  
[Jeff.Justman@FaegreBD.com](mailto:Jeff.Justman@FaegreBD.com)  
[Daniel.Kelley@FaegreBD.com](mailto:Daniel.Kelley@FaegreBD.com)  
[Matt.Giffin@FaegreBD.com](mailto:Matt.Giffin@FaegreBD.com)  
[Irina.Vaynerman@FaegreBD.com](mailto:Irina.Vaynerman@FaegreBD.com)

*Counsel for Voters*

**Certificate of Service**

I certify that on January 17, 2019, I have electronically filed the foregoing with the Clerk of the Court using the ECF system, which will send notification of this filing to all counsel of record in this matter.

/s/ Joseph H. Yeager, Jr.

**UNITED STATES DISTRICT COURT  
EASTERN DISTRICT OF MICHIGAN  
SOUTHERN DIVISION**

LEAGUE OF WOMEN VOTERS  
OF MICHIGAN, ROGER J. BRDAK,  
FREDERICK C. DURHAL, JR.,  
JACK E. ELLIS, DONNA E.  
FARRIS, WILLIAM “BILL” J.  
GRASHA, ROSA L. HOLLIDAY,  
DIANA L. KETOLA, JON “JACK” G.  
LASALLE, RICHARD “DICK” W.  
LONG, LORENZO RIVERA and  
RASHIDA H. TLAIB,

Plaintiffs,

v.

JOCELYN BENSON, in her official  
Capacity as Michigan  
Secretary of State,

Defendant.

No. 2:17-cv-14148

Hon. Eric L. Clay  
Hon. Denise Page Hood  
Hon. Gordon J. Quist

---

**DEFENDANT’S RESPONSE TO DEFENDANTS-INTERVENORS’  
EMERGENCY MOTION TO STAY TRIAL**

NOW COMES Defendant Jocelyn Benson, in her official capacity as Michigan Secretary of State, by her counsel MILLER, CANFIELD, PADDOCK and STONE, PLC, and hereby responds to the Congressional and Legislative Defendants-Intervenors’ (“Intervenors”) Emergency Motion to Stay Trial (ECF 183). As described in more detail below, the Secretary of State concurs with the Intervenors’ request to adjourn the trial date in this matter.

On January 11, 2019, Intervenor filed their motion for an emergency stay of the trial in this case currently scheduled for February 5, 2019, pending the United States Supreme Court's disposition of two cases set for oral argument during the Spring 2019 term, *Rucho v. Common Cause* (No. 18-422) and *Lamone v. Benisek* (No. 18-726) (ECF 183). This Court then ordered expedited briefing on January 15, 2019 (ECF 192), setting January 17, 2019, as the deadline to respond.

The Secretary of State agrees that an adjournment of the trial date is appropriate for the circumstances of this case. An adjournment will permit the Secretary of State and Plaintiffs the opportunity to focus their efforts on negotiating a mutually agreeable and complete resolution of their disputes that: serves the public interest of the State of Michigan; conserves public and judicial resources; mitigates the impact of any past impermissible partisan gerrymandering; and obviates the need for further proceedings in this case, including trial.

Well-established federal policy favors voluntary resolution of disputes, particularly complex litigation implicating public resources and the public fisc. *See, e.g., United States v. Lexington-Fayette Urban Cty. Gov't*, 591 F.3d 484, 490–91 (6th Cir. 2010); *Aro Corp. v. Allied Witan Co.*, 531 F.2d 1368, 1372 (6th Cir. 1976); *United States v. Metro. Gov't of Nashville & Davidson Cty.*, No. 3:07-1056, 2009 WL 690693, at \*6 (M.D. Tenn. Mar. 12, 2009). One such method of resolution is the entry of a consent decree reflecting a compromise negotiated by



the parties and approved by the court as “fair, adequate, and reasonable, as well as consistent with the public interest.” *United States v. Cty. of Muskegon*, 298 F.3d 569, 581 (6th Cir. 2002) (internal quotation marks omitted). *See also Local No. 93, Int’l Ass’n of Firefighters, AFL-CIO C.L.C. v. City of Cleveland*, 478 U.S. 501, 528–29 (1986) (“A consent decree is primarily a means by which parties settle their disputes without having to bear the financial and other costs of litigating.”).

The Secretary of State believes that such a resolution in this case is in the best interests of the State of Michigan and its voters, as it will correct any lasting impact of impermissible partisan gerrymandering that may have occurred in the past. While achieving those goals, an expedient resolution of this controversy by consent decree will *also* conserve public resources, including taxpayer funds and the time and productivity of public officials that would be otherwise consumed through multiple forthcoming stages of a resource-intensive litigation, and provide certainty and finality to this dispute.

Notably, in 2020 a voter-approved, nonpartisan Independent Citizens Redistricting Commission (“ICRC”) will be convened and responsible for redrawing all state legislative and federal congressional districts in Michigan using well-accepted, nonpartisan criteria. As that ICRC implementation date draws nearer, any benefit to continuing this litigation further conversely declines,

particularly when the parties will likely be able to reach a mutually favorable resolution that ensures a just outcome for Michigan voters.

For these reasons, the Secretary of State respectfully requests that this Court adjourn the trial currently scheduled in this case for February 5, 2019.

Respectfully submitted,

MILLER, CANFIELD, PADDOCK AND STONE, P.L.C.

By: /s/ Michael J. Hodge

Michael J. Hodge (P25146)

Scott R. Eldridge (P66452)

Erika L. Giroux (P81998)

*Attorneys for Defendant Secretary of State*

One Michigan Avenue, Suite 900

Lansing, MI 48933

(517) 487-2070

[hodge@millercanfield.com](mailto:hodge@millercanfield.com)

[eldridge@millercanfield.com](mailto:eldridge@millercanfield.com)

[giroux@millercanfield.com](mailto:giroux@millercanfield.com)

Dated: January 17, 2019

**UNITED STATES DISTRICT COURT  
EASTERN DISTRICT OF MICHIGAN  
SOUTHERN DIVISION**

LEAGUE OF WOMEN VOTERS  
OF MICHIGAN, ROGER J. BRDAK,  
FREDERICK C. DURHAL, JR.,  
JACK E. ELLIS, DONNA E.  
FARRIS, WILLIAM “BILL” J.  
GRASHA, ROSA L. HOLLIDAY,  
DIANA L. KETOLA, JON “JACK” G.  
LASALLE, RICHARD “DICK” W.  
LONG, LORENZO RIVERA and  
RASHIDA H. TLAIB,

Plaintiffs,

v.

JOCELYN BENSON, in her official  
Capacity as Michigan  
Secretary of State,

Defendant.

No. 2:17-cv-14148

Hon. Eric L. Clay  
Hon. Denise Page Hood  
Hon. Gordon J. Quist

---

**CERTIFICATE OF SERVICE**

I hereby certify that on January 17, 2019, I filed Defendant’s Response to Defendant-Intervenors’ Emergency Motion to Stay Trial via the ECF e-filing system.

By: /s/ Michael J. Hodge  
Michael J. Hodge  
Miller, Canfield, Paddock and Stone, PLC  
One Michigan Ave.  
Suite 900  
Lansing, MI 48933  
(517) 483-4921

IN THE UNITED STATES DISTRICT COURT  
EASTERN DISTRICT OF MICHIGAN  
SOUTHERN DIVISION

LEAGUE OF WOMEN VOTERS  
OF MICHIGAN, et al.,

Plaintiffs,

Civil Action No. 17-cv-14148

v.

RUTH JOHNSON, in her official  
capacity as Michigan Secretary of State

Hon. Eric L. Clay  
Hon. Denise Page Hood  
Hon. Gordon J. Quist

Defendant.

\_\_\_\_\_ /

**CONGRESSIONAL AND LEGISLATIVE  
DEFENDANTS-INTERVENORS' REPLY IN  
SUPPORT OF EMERGENCY MOTION TO STAY TRIAL**

The Congressional and Legislative Defendants-Intervenors, by and through their attorneys, hereby reply to Plaintiffs' and the Secretary of State's respective responses to Defendants-Intervenors' Emergency Motion to Stay Trial, and state as follows.

Defendants-Intervenors moved to stay the trial in this case because the Supreme Court will soon decide two cases—*Common Cause v. Rucho* (Sup. Ct. #18-422) and *Benisek v. Lamone* (Sup. Ct. #18-726)—which will decide whether federal court subject matter jurisdiction exists over such gerrymandering disputes and, if so, the framework under which such disputes are to be decided. The

responses filed by both the Defendant Secretary of State and Plaintiffs indicate concurrence in the motion to stay. (ECF Nos. 199 & 200). Moreover, neither Defendant Secretary of State nor Plaintiffs have claimed a stay will prejudice them or the public (indeed, their responses suggest the opposite), and so the concern identified by the Court in its earlier order denying a stay no longer appear to be an obstacle. (See ECF No. 35, p. 2-3). The Court should therefore grant the motion to stay.

Defendant Secretary of State's suggestion and Plaintiffs' request, that the Court stay the case pending their joint motion to approve a consent decree, is both procedurally improper and substantively wrong. That is, "it is procedurally improper to assert new motions for relief in a response brief to a different party's motion." *Bush v. Godwin*, No. 3:15-CV-524-TAV-CCS, 2018 WL 576850, at \*13 (E.D. Tenn. Jan. 26, 2018). And, that procedural barrier aside, substantively, Plaintiffs and the Secretary simply cannot enter into a consent decree that imposes any obligation on Intervenors without Intervenors also agreeing to do so. See *Olden v. LaFarge Corp.*, 383 F.3d 495, 512 (6th Cir. 2004) (citing *Lawyer v. Dep't. of Justice*, 521 U.S. 567, 579 (1997) ("[A] settlement agreement subject to court approval in a nonclass action may not impose duties or obligations on an unconsenting party or 'dispose' of his claims.") (citation omitted); *Firefighters v.*

*City of Cleveland*, 478 U.S. 501, 529 (1986) (“[A] court may not enter a consent decree that imposes obligations on a party that did not consent to the decree.”) (citations omitted)).

Alternatively, assuming solely for argument sake that Plaintiffs and the Secretary can enter into such a decree without the Intervenor, and can do so prior to February 5th, it nonetheless remains that Intervenor is also in this case. As such, any alleged consent decree between Plaintiffs and the Secretary would do nothing to affect Intervenor’s rights. Said differently, absent a stay by this Court based on the Supreme Court’s rulings in *Rucho* and *Benisek*, as requested by the Intervenor, the trial would nonetheless be required to go forward regardless of what Plaintiffs and the Secretary may do.

Finally, it is important to correct a fundamental factual misstatement by Plaintiffs’ counsel Joseph H. Yeager, Jr. Mr. Yeager states in Plaintiffs’ response that Defendants-Intervenor “have not chosen to participate in the discussion” regarding settlement. (ECF No. 200, ¶ 3). This statement is false. Mr. Yeager neither invited Defendants-Intervenor to participate in settlement discussions nor did Defendants-Intervenor ever reject an invitation to participate. To the extent settlement discussions have been held, these discussions have occurred in secret and without any offer to allow Defendants-Intervenor to participate.

WHEREFORE, Defendants-Intervenors respectfully request the Court grant their motion and stay the trial of this case pending the final decisions of the United States Supreme Court in *Common Cause v. Rucho* (Sup. Ct. #18-422) and *Benisek v. Lamone* (Sup. Ct. 18-726), and the Court do so on that basis alone.

Respectfully submitted,

**Holtzman Vogel Josefiak  
Torchinsky PLLC**

/s/ Jason Torchinsky

Jason Torchinsky  
Shawn Sheehy  
Phillip Gordon  
45 North Hill Drive, S 100  
Warrenton, Virginia 20106  
(540) 341-8800  
JTorchinsky@hvjt.law  
ssheehy@hvjt.law  
pgordon@hvjt.law  
Attorneys for Applicants

**Clark Hill PLC**

/s/ Charles R. Spies

Charles R. Spies (DC 88445)  
Brian D. Shekell (P75327)  
212 E. Cesar Chavez Ave.  
Lansing, Michigan 48906  
(517) 318-3100  
cspies@clarkhill.com  
bshekell@clarkhill.com  
Attorneys for Applicants

Date: January 18, 2019

**CERTIFICATE OF SERVICE**

I hereby certify that on January 18, 2019, I electronically filed the foregoing paper with the Clerk of the Court using the ECF system which will send notification of such filing to all of the parties of record.

**CLARK HILL PLC**

/s/ Charles R. Spies



UNITED STATES DISTRICT COURT  
EASTERN DISTRICT OF MICHIGAN  
SOUTHERN DIVISION

LEAGUE OF WOMEN VOTERS  
OF MICHIGAN, et al.,

Plaintiffs,

v.

JOCELYN BENSON, in her official  
Capacity as Michigan  
Secretary of State, et al.,

Defendants.

)  
) Case No. 2:17-cv-14148  
)

) Hon. Eric L. Clay  
) Hon. Denise Page Hood  
) Hon. Gordon J. Quist  
)

) **REQUEST FOR LEAVE TO**  
) **SUBMIT SURREPLY**  
)  
)  
)

Joseph H. Yeager, Jr. (IN 2083-49)  
Kevin M. Toner (IN 11343-49)  
Harmony A. Mappes (IN 27237-49)  
Jeffrey P. Justman (MN 390413)  
FAEGRE BAKER DANIELS LLP  
300 North Meridian Street, Suite 2700  
Indianapolis, IN 46204  
Telephone: 317-237-0300  
[Jay.Yeager@FaegreBD.com](mailto:Jay.Yeager@FaegreBD.com)  
[Kevin.Toner@FaegreBD.com](mailto:Kevin.Toner@FaegreBD.com)  
[Harmony.Mappes@FaegreBD.com](mailto:Harmony.Mappes@FaegreBD.com)  
[Jeff.Justman@FaegreBD.com](mailto:Jeff.Justman@FaegreBD.com)

Mark Brewer (P35661)  
GOODMAN ACKER P.C.  
17000 West Ten Mile, Second Floor  
Southfield, MI 48075  
Telephone: 248-483-5000  
[MBrewer@goodmanacker.com](mailto:MBrewer@goodmanacker.com)

*Counsel for Plaintiffs*

On January 18, 2019, Congressional Intervenor and Legislative Defendants-Intervenor (“Intervenor”) filed their Reply in Support of Emergency Motion to Stay Trial (“Reply”) (ECF 203). At page 3 of the Reply, Intervenor incorrectly characterize a statement in the Plaintiffs’ Response to Congressional and Legislative Defendants-Intervenor’s Emergency Motion to Stay Trial (ECF 200) as “false.”

Intervenor’s accusation of falsehood is wholly incorrect. It requires a response.

Plaintiffs respectfully request that the Court allow them to file the attached surreply which is limited strictly to the above matter, in order to demonstrate the accuracy of their statements on this issue. Plaintiffs will address at the appropriate time the other matters in Intervenor’s Reply regarding the Court’s ability to approve a consent decree.

Pursuant to L.R. 7.1 Plaintiffs have asked Intervenor’s counsel and the Secretary’s counsel whether they concur with this request. The Secretary’s counsel concurred. The Intervenor’s counsel also concurred but on certain conditions, which Plaintiffs have complied with. The email exchange reflecting those conditions is attached hereto.

Date: January 19, 2019

/s/ Harmony A. Mappes

Mark Brewer (P35661)  
GOODMAN ACKER P.C.  
17000 West Ten Mile, Second Floor  
Southfield, MI 48075  
Telephone: 248-483-5000  
Fax: 248-483-3131  
MBrewer@goodmanacker.com

Joseph H. Yeager, Jr. (IN Bar No. 2083-49)  
Kevin M. Toner (IN Bar No. 11343-49)  
Harmony A. Mappes (IN Bar No. 27237-49)  
Jeffrey P. Justman (MN Bar No. 390413)  
FAEGRE BAKER DANIELS LLP  
300 North Meridian Street, Suite 2700  
Indianapolis, IN 46204  
Telephone: 317-237-0300  
Fax: 317-237-1000  
Jay.Yeager@FaegreBD.com  
Kevin.Toner@FaegreBD.com  
Harmony.Mappes@FaegreBD.com  
Jeff.Justman@FaegreBD.com

*Counsel for Plaintiffs*

**CERTIFICATE OF SERVICE**

I hereby certify that on January 19, 2019, I caused to have electronically filed the foregoing paper with the Clerk of the Court using the ECF system, which will send notification of such filing to all counsel of record in this matter.

Respectfully submitted,

/s/ Harmony A. Mappes

# EXHIBIT

**Yeager, Jay**

---

**From:** Spies, Charles R. <[cspies@clarkhill.com](mailto:cspies@clarkhill.com)>  
**Sent:** Friday, January 18, 2019 5:58 PM  
**To:** Yeager, Jay <[Jay.Yeager@faegrebd.com](mailto:Jay.Yeager@faegrebd.com)>; [jtorchinsky@hvjt.law](mailto:jtorchinsky@hvjt.law); Shawn Sheehy ([ssheehy@hvjt.law](mailto:ssheehy@hvjt.law)) <[ssheehy@hvjt.law](mailto:ssheehy@hvjt.law)>; Scott R. Eldridge ([eldridge@millercanfield.com](mailto:eldridge@millercanfield.com)) <[eldridge@millercanfield.com](mailto:eldridge@millercanfield.com)>; Mike Hodge ([hodge@millercanfield.com](mailto:hodge@millercanfield.com)) <[hodge@millercanfield.com](mailto:hodge@millercanfield.com)>  
**Cc:** Toner, Kevin M. <[Kevin.Toner@FaegreBD.com](mailto:Kevin.Toner@FaegreBD.com)>; Mark Brewer ([mbrewer@goodmanacker.com](mailto:mbrewer@goodmanacker.com)) <[mbrewer@goodmanacker.com](mailto:mbrewer@goodmanacker.com)>; Mappes, Harmony A. <[Harmony.Mappes@FaegreBD.com](mailto:Harmony.Mappes@FaegreBD.com)>; Justman, Jeffrey P. <[Jeff.Justman@FaegreBD.com](mailto:Jeff.Justman@FaegreBD.com)>; Shekell, Brian D. <[bshekell@clarkhill.com](mailto:bshekell@clarkhill.com)>  
**Subject:** RE: Expedited Request pursuant to Rule 7.1

Intervening Defendants consent to your filing a surreply on this issue on the condition that you attach to your filing the full e-mail exchange from today (my e-mail to you at 8:55 AM, your response e-mail at 11:02 AM, and my reply at 5:39 PM) in order to ensure that the Court has the full facts in front of them.

- Charlie

**Charles R. Spies**

CLARK HILL PLC

202.572.8663 (Direct) | 202.572.8683 (Fax) | 202.957.6847 (Cell)

**From:** Yeager, Jay [<mailto:Jay.Yeager@faegrebd.com>]  
**Sent:** Friday, January 18, 2019 5:12 PM  
**To:** Spies, Charles R.; [jtorchinsky@hvjt.law](mailto:jtorchinsky@hvjt.law); Shawn Sheehy ([ssheehy@hvjt.law](mailto:ssheehy@hvjt.law)); Scott R. Eldridge ([eldridge@millercanfield.com](mailto:eldridge@millercanfield.com)); Mike Hodge ([hodge@millercanfield.com](mailto:hodge@millercanfield.com))  
**Cc:** Toner, Kevin M.; Mark Brewer ([mbrewer@goodmanacker.com](mailto:mbrewer@goodmanacker.com)); Mappes, Harmony A.; Justman, Jeffrey P.  
**Subject:** Expedited Request pursuant to Rule 7.1

All –

Plaintiffs will file a request for leave to file a surreply to Intervenor's Reply (ECF 203) filed earlier today. The proposed surreply will be confined to correcting Intervenor's factual misstatements in the Reply regarding generally the circumstances around Intervenor's lack of participation in settlement discussions.

Pursuant to LR 7.1, please let me know whether you concur with the motion for leave.  
Thank you.

Jay Yeager

**Senior Counsel**

[jay.yeager@FaegreBD.com](mailto:jay.yeager@FaegreBD.com) [Download vCard](#)

D: +1 317 237 1278

**Faegre Baker Daniels LLP**

300 N. Meridian Street | Suite 2700 | Indianapolis, IN 46204, USA

*This email message and any attachments are confidential and may be privileged. If you are not the intended recipient, please notify us immediately by reply email and destroy all copies of this message and any attachments. Please do not copy, forward, or disclose the contents to any other person. Thank you.*

UNITED STATES DISTRICT COURT  
EASTERN DISTRICT OF MICHIGAN  
SOUTHERN DIVISION

LEAGUE OF WOMEN VOTERS  
OF MICHIGAN, et al.,

Plaintiffs,

v.

JOCELYN BENSON, in her official  
Capacity as Michigan  
Secretary of State, et al.,

Defendants.

)  
) Case No. 2:17-cv-14148  
)

) Hon. Eric L. Clay  
) Hon. Denise Page Hood  
) Hon. Gordon J. Quist  
)

) **PLAINTIFFS' SURREPLY IN**  
) **RESPONSE TO INTERVENORS'**  
) **EMERGENCY MOTION TO**  
) **STAY TRIAL**  
)

Joseph H. Yeager, Jr. (IN 2083-49)  
Kevin M. Toner (IN 11343-49)  
Harmony A. Mappes (IN 27237-49)  
Jeffrey P. Justman (MN 390413)  
FAEGRE BAKER DANIELS LLP  
300 North Meridian Street, Suite 2700  
Indianapolis, IN 46204  
Telephone: 317-237-0300  
[Jay.Yeager@FaegreBD.com](mailto:Jay.Yeager@FaegreBD.com)  
[Kevin.Toner@FaegreBD.com](mailto:Kevin.Toner@FaegreBD.com)  
[Harmony.Mappes@FaegreBD.com](mailto:Harmony.Mappes@FaegreBD.com)  
[Jeff.Justman@FaegreBD.com](mailto:Jeff.Justman@FaegreBD.com)

Mark Brewer (P35661)  
GOODMAN ACKER P.C.  
17000 West Ten Mile, Second Floor  
Southfield, MI 48075  
Telephone: 248-483-5000  
[MBrewer@goodmanacker.com](mailto:MBrewer@goodmanacker.com)

*Counsel for Plaintiffs*



**Plaintiffs' Surreply in Response to Intervenor's  
Emergency Motion to Stay Trial**

On January 18, 2019, Congressional Intervenor and Legislative Defendants-Intervenor ("Intervenor") filed their Reply in Support of Emergency Motion to Stay Trial (ECF 203) ("Reply"). Intervenor represented to the Court:

Mr. Yeager states in Plaintiffs' response that Defendants-Intervenor "have not chosen to participate in the discussion" regarding settlement. (ECF No. 200, ¶ 3). **This statement is false.** Mr. Yeager neither invited Defendants-Intervenor to participate in settlement discussions nor did Defendants-Intervenor ever reject an invitation to participate. To the extent settlement discussions have been held, these discussions have occurred in secret and without any offer to allow Defendants-Intervenor to participate.

Reply at 3 (emphasis supplied).

These statements are as incorrect as they are unfortunate. The truth is that on January 10 and 11, Mr. Yeager suggested the possibility of settlement to Intervenor's counsel and expressly asked about Intervenor's interest in participating in settlement discussions. Notwithstanding those overtures, at the time of Plaintiffs' response, Intervenor had not yet chosen to participate in any settlement discussions. Their incorrect claim that Plaintiffs are misleading the Court requires this short response.

**FACTS**

The following facts are supported by the Declaration of Joseph H. Yeager, Jr., attached hereto as Exhibit 1, and the emails attached hereto as Exhibits 2 through 5.

On the morning of January 10, 2019, Plaintiffs' counsel Yeager spoke by phone with Intervenor's counsel Jason Torchinsky and Shawn Sheehy regarding Intervenor's

stated intent to move to stay this case. Ex. 1 ¶ 3. During that conversation Yeager stated that Plaintiffs would consider agreeing to a continuance of the trial because they had been considering settlement and already had discussed the subject with counsel for the Secretary of State. *Id.* Yeager asked Torchinsky what he thought about the prospect of settlement, and whether Intervenor would be interested in such a discussion. *Id.*

Torchinsky asked Yeager what the settlement might look like and Yeager responded that while there had been no agreement on any concrete terms, Plaintiffs had suggested a compromise in which fewer than the 34 challenged districts would be redistricted. *Id.* ¶ 4. After some brief additional discussion about possible terms, Torchinsky stated he was not able to discuss the matter further because he needed to consult with his clients. *Id.*

The subject arose again in an email exchange that afternoon, regarding terms for a possible continuance. Ex. 2 at 2. In that exchange Torchinsky asked Yeager whether Plaintiffs' potential agreement on a continuance was "contingent on our clients participating in settlement discussions during the continuance?" *Id.* Yeager responded by email that Plaintiffs' position regarding stay "does not need to be contingent on whether Intervenor choose to participate in settlement discussions." *Id.* at 1.

Later that evening Intervenor's counsel sent another email to Yeager and attached a "sketch of a motion" that Plaintiffs would file.<sup>1</sup> Ex. 2 at 1,5. This draft referred to "ongoing discussions among the parties" as one basis for a stay, which Plaintiffs' counsel took as another reference to the possible settlement discussions Yeager referenced earlier in the day. *Id.*, Ex. 1 ¶ 5.

The next afternoon, January 11<sup>th</sup>, at 3:00 pm. counsel for all parties spoke further regarding Intervenor's contemplated motion for stay. Ex. 1 ¶ 6. During that call, Torchinsky asked whether Plaintiffs and Secretary were then actually involved in a settlement negotiation. *Id.* Secretary's counsel Scott Eldridge said that the Secretary was considering whether to settle but had made no decisions yet. *Id.* Plaintiffs' counsel Yeager noted that Intervenor had not responded to his inquiry from the prior day about whether Intervenor were interested in a settlement discussion. *Id.* No Intervenor counsel responded to that comment. *Id.*

No Intervenor counsel asked to participate in settlement discussions or made any settlement proposal prior to filing their Reply. *Id.* at ¶ 7.

### **ARGUMENT**

As shown above, Intervenor knew that the other parties had expressed interest in discussing settlement. By the close of business on Friday, January 11<sup>th</sup>, Plaintiffs' counsel and Intervenor's counsel had conducted two telephone conversations and one email exchange in which the prospect of settlement negotiations was discussed.

---

<sup>1</sup> Plaintiffs' counsel had never suggested they would themselves file a motion for stay.

In the first phone call Plaintiffs' counsel disclosed the general structure that Plaintiffs would propose for settlement and asked whether Intervenor's were interested in settlement discussions. Intervenor's counsel said he needed to consult with his clients, and he later asked by mail whether other matters were contingent on his clients' participation in that discussion.

Plaintiffs first mentioned settlement to the Court in their response brief. On January 17, 2019, Plaintiffs filed their Response to Congressional and Legislative Defendants-Intervenor's Emergency Motion to Stay Trial ("Plaintiffs' Response") (ECF 200). At paragraph 3, Plaintiffs' counsel Yeager briefly summarized the facts stated above and the then-current status. He accurately recited that he had notified Intervenor's counsel on January 10, 2019, of the prospect of settlement discussions and had asked whether Intervenor's were interested in settlement. Yeager also stated in Plaintiffs' Response that "they [Intervenor's] **have not chosen to participate** in the discussion." ECF 200 ¶ 3 (emphasis supplied).

Those statements are true. Ex. 1, ¶¶ 1-7. Intervenor's arguments and characterizations to the contrary are not.

On January 10, Plaintiffs' counsel raised the subject of settlement discussions with Intervenor's counsel, indicated there had been a preliminary discussion with the Secretary's counsel, asked whether the Intervenor's were interested in those discussions, and even explained the general structure settlement being proposed by Plaintiffs. *Id.* ¶¶ 3,4.

Intervenors' counsel made no response when Plaintiffs' counsel raised the matter again the next day. Ex. 1 ¶ 6. Based on Intervenors' silence on the topic then and through the filing of the Plaintiffs' Response it was wholly accurate for Plaintiffs to advise the Court that Intervenors had "not chosen" to participate in settlement discussions.

There is no merit to Intervenors' harsh and unsupported accusation that Plaintiffs' counsel presented an outright falsehood to the Court. As of the filing of Plaintiffs' Response on January 18<sup>th</sup>, Intervenors undeniably (1) knew that they had been asked about their interest in a settlement discussion, but (2) had "not chosen" to participate in such a discussion. Plaintiffs have not said that Intervenors have declined any invitation to negotiate. Instead, Plaintiffs accurately advised the Court of the sequence of events that led them to support Intervenors' request to continue the trial.

Emails after Plaintiffs filed their Response confirm that it is Intervenors, not Plaintiffs, that mis-state the record. On the morning of January 18, Intervenors' counsel Charlie Spies sent an email to Plaintiffs' counsel Yeager accusing him of making a false statement to the Court. Exhibit 3, attached. Yeager promptly responded by email and explained why the statement in Plaintiffs' Response was entirely correct. Exhibit 4, attached. Yeager went on to ask that if Intervenors chose nonetheless to pursue the matter, that they explain why. He also volunteered to discuss the matter by telephone, and he volunteered to discuss the matter with the Court at the conference scheduled for January 22. *Id.* Yeager also asked yet again

whether Intervenor were interested in settlement, and if so what their position might be – noting that Plaintiffs’ suggested structure had already been communicated (on January 10). *Id.*

Instead of replying by email or calling Plaintiffs’ counsel, Intervenor filed their Reply, making false accusations against Yeager.<sup>2</sup> Notably, Mr. Spies, one of Intervenor’s counsel who signed the Reply, was apparently not on the January 10 or 11 phone calls. See Ex. 5 ¶ 1. Nonetheless, there is little dispute about what was said on the calls, and no dispute about what the emails say.

Plaintiffs of course have no desire or interest in misleading the Court about this or any other matter and file this surreply in a continued effort to be candid with the Court about the status of this case and to correct the inaccurate and unsupported representations made in the Reply.

---

<sup>2</sup> Late on January 18, after Plaintiffs sought concurrence with their request to file this surreply, Intervenor’s counsel sent another email, which Plaintiffs attach hereto as Exhibit 5 for completeness and at Intervenor’s specific request. The email largely replays the ground discussed above, but also takes a new tack directly rebutted by the evidence. The email calls Yeager’s solicitation of interest in a settlement discussion “your ‘settlement discussions **as a condition** to consenting to the stay’ proposal.” Ex. 5 ¶ 4 (emphasis supplied). It also says “[a]t no time did you ask if our clients were interested in settlement (**absent as a condition** for your consent to a stay).” *Id.* ¶ 5 (emphasis supplied). These statements are simply incorrect. Yeager expressly told Intervenor on January 10, in writing, in response to their direct inquiry, that the stay discussion did “**not** need to be contingent on whether Intervenor choose to participate in settlement discussions.” Ex. 2 at 1 (emphasis supplied).

Date: January 19, 2019

/s/ Harmony A. Mappes

/s/ Kevin M. Toner

/s/ Jeffrey P. Justman

/s/ Mark Brewer

Mark Brewer (P35661)  
GOODMAN ACKER P.C.  
17000 West Ten Mile, Second Floor  
Southfield, MI 48075  
Telephone: 248-483-5000  
Fax: 248-483-3131  
[MBrewer@goodmanacker.com](mailto:MBrewer@goodmanacker.com)

Joseph H. Yeager, Jr. (IN Bar No. 2083-49)  
Kevin M. Toner (IN Bar No. 11343-49)  
Harmony A. Mappes (IN Bar No. 27237-49)  
Jeffrey P. Justman (MN Bar No. 390413)  
FAEGRE BAKER DANIELS LLP  
300 North Meridian Street, Suite 2700  
Indianapolis, IN 46204  
Telephone: 317-237-0300  
Fax: 317-237-1000  
[Jay.Yeager@FaegreBD.com](mailto:Jay.Yeager@FaegreBD.com)  
[Kevin.Toner@FaegreBD.com](mailto:Kevin.Toner@FaegreBD.com)  
[Harmony.Mappes@FaegreBD.com](mailto:Harmony.Mappes@FaegreBD.com)  
[Jeff.Justman@FaegreBD.com](mailto:Jeff.Justman@FaegreBD.com)

*Counsel for Plaintiffs*

**CERTIFICATE OF SERVICE**

I hereby certify that on January 19, 2019, I caused to have electronically filed the foregoing paper with the Clerk of the Court using the ECF system, which will send notification of such filing to all counsel of record in this matter.

Respectfully submitted,

/s/ Harmony A. Mappes



# **EXHIBIT 1**

UNITED STATES DISTRICT COURT  
EASTERN DISTRICT OF MICHIGAN  
SOUTHERN DIVISION

LEAGUE OF WOMEN VOTERS	)	
OF MICHIGAN, et al.,	)	Case No. 2:17-cv-14148
	)	
Plaintiffs,	)	Hon. Eric L. Clay
	)	Hon. Denise Page Hood
v.	)	Hon. Gordon J. Quist
	)	
JOCELYN BENSON, in her official	)	
Capacity as Michigan	)	
Secretary of State, et al.,	)	
	)	
Defendants.	)	

**DECLARATION OF JOSEPH H. YEAGER, JR.**

I, Joseph H. Yeager, Jr., declare under penalty of perjury and pursuant to  
28 U.S.C. § 1746, as follows:

1. I am Senior Counsel at the firm of Faegre Baker Daniels LLP and one of  
counsel for the Plaintiffs in this action.
2. I have personal knowledge of the matters set forth below.
3. On the morning of January 10, 2018, I spoke by phone with Intervenor's  
counsel Jason Torchinsky and Shawn Sheehy regarding Intervenor's stated intent to  
move to stay this case. During that conversation I stated that Plaintiffs would  
consider agreeing to a continuance of the trial because they had been considering  
settlement and already had discussed the subject with counsel for the Secretary of

State. I asked Mr. Torchinsky what he thought about the prospect of settlement, and whether Intervenor would be interested in such a discussion.

4. Mr. Torchinsky asked me what the settlement might look like. I responded that while there had been no agreement on any concrete terms, Plaintiffs had suggested a compromise in which fewer than the 34 challenged districts would be redistricted. After some brief additional discussion about possible terms, Mr. Torchinsky stated he was not able to discuss the matter further because he needed to consult with his clients.

5. Later that evening Mr. Torchinsky emailed me a “sketch of a motion” that Plaintiffs would file (even though I had never suggested to him that Plaintiffs would themselves file a motion for stay). Mr. Torchinsky’s “sketch” referred to “ongoing discussions among the parties” as one basis for a stay, which I took as a reference to the possible settlement discussions Mr. Torchinsky and I discussed earlier that day.

6. The next afternoon, January 11<sup>th</sup>, at 3:00 pm. counsel for all parties spoke further regarding Intervenor’s contemplated motion for stay. During that call, Mr. Torchinsky asked whether the Plaintiffs and Secretary were then actually involved in a settlement negotiation. Secretary’s counsel Scott Eldridge said that the Secretary was considering whether to settle but had made no decisions yet. I noted that Intervenor had not responded to my inquiry from the prior day about whether

Intervenors were interested in a settlement discussion. No Intervenor counsel responded to that comment.

7. No Intervenor counsel asked to participate in settlement discussions or made any settlement proposal prior to filing their Reply.

8. The documents attached herewith as Exhibits 2-5 are true and accurate copies of the email exchanges in which I participated, as reflected therein.

I hereby declare under penalty of perjury that the foregoing is true and correct.

J. H. Y. S. 1  
1.19.2019

# **EXHIBIT 2**

**Yeager, Jay**

---

**From:** Jason Torchinsky <jtorchinsky@hvjt.law>  
**Sent:** Thursday, January 10, 2019 9:12 PM  
**To:** Yeager, Jay; Ryan M. Shannon; eldridge@millercafield.com; hodge@millercafield.com  
**Cc:** Shawn Sheehy; Krawiec, Daniel A.; bshekell@clarkhill.com; Charlie Spies; Phil Gordon  
**Subject:** Re: Request for Consent  
**Attachments:** MI Continuance.docx

Jay,

Thank you for continuing this dialogue.

In the spirit of the discussion below, I have draft a sketch of a motion to reflect what I understand to be your proposal and to serve as the basis for discussion and editing.

We'd like to resolve this by mid-afternoon tomorrow. Otherwise, we will proceed with filing our motion for stay tomorrow evening.

Thanks,  
Jason

Jason Torchinsky  
Holtzman Vogel Josefiak Torchinsky PLLC

---

**From:** "Yeager, Jay" <Jay.Yeager@faegrebd.com>  
**Date:** Thursday, January 10, 2019 at 5:33 PM  
**To:** Jason Torchinsky <jtorchinsky@hvjt.law>, "Ryan M. Shannon" <RShannon@dickinson-wright.com>, "eldridge@millercafield.com" <eldridge@millercafield.com>, "hodge@millercafield.com" <hodge@millercafield.com>  
**Cc:** Shawn Sheehy <ssheehy@hvjt.law>, "Krawiec, Daniel A." <dkrawiec@clarkhill.com>, "bshekell@clarkhill.com" <bshekell@clarkhill.com>  
**Subject:** RE: Request for Consent

It does not need to be contingent on whether intervenors choose to participate in settlement discussions. But as noted below we would need the commitment to the proposed notice timing as well as the material (e.g. 50%) shortening of other appellate deadlines.

---

**From:** Jason Torchinsky <jtorchinsky@hvjt.law>  
**Sent:** Thursday, January 10, 2019 5:24 PM  
**To:** Yeager, Jay <Jay.Yeager@faegrebd.com>; Ryan M. Shannon <RShannon@dickinson-wright.com>; eldridge@millercafield.com; hodge@millercafield.com  
**Cc:** Shawn Sheehy <ssheehy@hvjt.law>; Krawiec, Daniel A. <dkrawiec@clarkhill.com>; bshekell@clarkhill.com  
**Subject:** Re: Request for Consent

Jay,

Is that contingent on our clients participating in settlement discussions during the continuance? Or is this consent to a continuance of the trial as long as both Defendant / Defendant-Intervenors and Plaintiffs each agree to file any notice of appeal within one week of judgment?

-Jason

Jason Torchinsky  
Holtzman Vogel Josefiak Torchinsky PLLC

---

**From:** "Yeager, Jay" <[Jay.Yeager@faegrebd.com](mailto:Jay.Yeager@faegrebd.com)>  
**Date:** Thursday, January 10, 2019 at 5:22 PM  
**To:** Jason Torchinsky <[jtorchinsky@hvjt.law](mailto:jtorchinsky@hvjt.law)>, "Ryan M. Shannon" <[RShannon@dickinson-wright.com](mailto:RShannon@dickinson-wright.com)>, "[eldridge@millercanfield.com](mailto:eldridge@millercanfield.com)" <[eldridge@millercanfield.com](mailto:eldridge@millercanfield.com)>, "[hodge@millercanfield.com](mailto:hodge@millercanfield.com)" <[hodge@millercanfield.com](mailto:hodge@millercanfield.com)>  
**Cc:** Shawn Sheehy <[ssheehy@hvjt.law](mailto:ssheehy@hvjt.law)>, "Krawiec, Daniel A." <[dkrawiec@clarkhill.com](mailto:dkrawiec@clarkhill.com)>, "[bshekell@clarkhill.com](mailto:bshekell@clarkhill.com)" <[bshekell@clarkhill.com](mailto:bshekell@clarkhill.com)>  
**Subject:** RE: Request for Consent

Likewise.

As you might expect we are concerned about the appellate timeline after a judgment. If the parties would agree to filing any notice of appeal in perhaps a week, and materially shortened timelines on appeal, I believe plaintiffs could concur in a continuance of the trial.

Thanks.

Jay

---

**From:** Jason Torchinsky <[jtorchinsky@hvjt.law](mailto:jtorchinsky@hvjt.law)>  
**Sent:** Thursday, January 10, 2019 5:08 PM  
**To:** Yeager, Jay <[Jay.Yeager@faegrebd.com](mailto:Jay.Yeager@faegrebd.com)>; Ryan M. Shannon <[RShannon@dickinson-wright.com](mailto:RShannon@dickinson-wright.com)>; [eldridge@millercanfield.com](mailto:eldridge@millercanfield.com); [hodge@millercanfield.com](mailto:hodge@millercanfield.com)  
**Cc:** Shawn Sheehy <[ssheehy@hvjt.law](mailto:ssheehy@hvjt.law)>; Krawiec, Daniel A. <[dkrawiec@clarkhill.com](mailto:dkrawiec@clarkhill.com)>; [bshekell@clarkhill.com](mailto:bshekell@clarkhill.com)  
**Subject:** Re: Request for Consent

Jay - We are still consulting with our client. Do you know where things stand with your clients?

Counsel for the Secretary – Are you able to indicate what the Secretary's position is on our consent requests?

Thanks,  
Jason

Jason Torchinsky  
Holtzman Vogel Josefiak Torchinsky PLLC

---

**From:** "Yeager, Jay" <[Jay.Yeager@faegrebd.com](mailto:Jay.Yeager@faegrebd.com)>  
**Date:** Thursday, January 10, 2019 at 11:02 AM  
**To:** Jason Torchinsky <[jtorchinsky@hvjt.law](mailto:jtorchinsky@hvjt.law)>, "Ryan M. Shannon" <[RShannon@dickinson-wright.com](mailto:RShannon@dickinson-wright.com)>, "[eldridge@millercanfield.com](mailto:eldridge@millercanfield.com)" <[eldridge@millercanfield.com](mailto:eldridge@millercanfield.com)>, "[hodge@millercanfield.com](mailto:hodge@millercanfield.com)" <[hodge@millercanfield.com](mailto:hodge@millercanfield.com)>

**Cc:** Shawn Sheehy <[ssheehy@hvit.law](mailto:ssheehy@hvit.law)>, "Krawiec, Daniel A." <[dkrawiec@clarkhill.com](mailto:dkrawiec@clarkhill.com)>, "[bshekell@clarkhill.com](mailto:bshekell@clarkhill.com)" <[bshekell@clarkhill.com](mailto:bshekell@clarkhill.com)>  
**Subject:** RE: Request for Consent

Jason –

Do you have a few minutes to discuss they stay request and the briefing schedule? I am at 317.237.1278.

Thanks.

Jay

---

**From:** Jason Torchinsky <[jtorchinsky@hvit.law](mailto:jtorchinsky@hvit.law)>

**Sent:** Wednesday, January 09, 2019 6:21 PM

**To:** Ryan M. Shannon <[RShannon@dickinson-wright.com](mailto:RShannon@dickinson-wright.com)>; Yeager, Jay <[Jay.Yeager@faegrebd.com](mailto:Jay.Yeager@faegrebd.com)>; [eldridge@millercanfield.com](mailto:eldridge@millercanfield.com); [hodge@millercanfield.com](mailto:hodge@millercanfield.com)

**Cc:** Shawn Sheehy <[ssheehy@hvit.law](mailto:ssheehy@hvit.law)>; Krawiec, Daniel A. <[dkrawiec@clarkhill.com](mailto:dkrawiec@clarkhill.com)>; [bshekell@clarkhill.com](mailto:bshekell@clarkhill.com)

**Subject:** Re: Request for Consent

All,

Just wanted to follow up on this email below. I also wanted to seek your position on our accompanying motion to expedite briefing on this forthcoming Motion to Stay. This would allow this issue to be ready for decision by the Court well in advance of trial, and permit an appropriate amount of time for expedited appellate review prior to the scheduled trial date for whichever side prevails.

Thanks,  
Jason

Jason Torchinsky  
Holtzman Vogel Josefiak Torchinsky PLLC

---

**From:** Jason Torchinsky <[jtorchinsky@hvit.law](mailto:jtorchinsky@hvit.law)>

**Date:** Wednesday, January 9, 2019 at 3:47 PM

**To:** "Ryan M. Shannon" <[RShannon@dickinson-wright.com](mailto:RShannon@dickinson-wright.com)>, "Yeager, Jay" <[Jay.Yeager@faegrebd.com](mailto:Jay.Yeager@faegrebd.com)>

**Cc:** Shawn Sheehy <[ssheehy@hvit.law](mailto:ssheehy@hvit.law)>, "Krawiec, Daniel A." <[dkrawiec@clarkhill.com](mailto:dkrawiec@clarkhill.com)>, "[bshekell@clarkhill.com](mailto:bshekell@clarkhill.com)" <[bshekell@clarkhill.com](mailto:bshekell@clarkhill.com)>

**Subject:** Request for Consent

Ryan and Jay,

We are seeking your position on our forthcoming motion to stay the ED MI proceedings pending the outcome of the appeals in *Rucho* and *Benisek*. Just last evening, the U.S. Supreme Court issued an expedited briefing order in that case. Briefing will be completed by the beginning of March, and the Supreme Court will hear oral argument during its March sitting which begins March 18.

Could you let us know your clients' position on this by noon tomorrow?

Thanks,  
Jason

--

Jason Torchinsky



**Holtzman Vogel Josefiak Torchinsky PLLC**  
**45 North Hill Drive, Suite 100**  
**Warrenton, VA 20186**  
**jt@hvjt.law**  
**(540) 341-8808 (phone)**  
**(540) 341-8809 (fax)**  
**(202) 302-6768 (cell)**

\* \* \* \* \*

*NOTICE: This communication may contain privileged or other confidential information. If you have received it in error, please advise the sender by reply email and immediately delete the message and any attachments without copying or disclosing the contents. Thank you.*

**DRAFT: FOR DISCUSSION PURPOSES ONLY**

**Plaintiffs' Unopposed Motion for a Continuance**

The Plaintiffs in this matter, by and through the undersigned counsel, hereby seek a continuance of the February 5, 2019 trial date. As the basis for good cause pursuant this Court's Case Management Orders and the Federal Rules of Civil Procedure, the Plaintiffs cite to the Supreme Court's recent announcement that it will hear *Common Cause v. Rucho* and *Benisek v. Lamone* on an expedited basis, and ongoing discussions among the parties.

As a condition of this continuance, the Plaintiffs request that from the time this continuance is lifted either by agreement of the parties or by order of the Court, the Notice of Appeal from any appealable order of this Court to the United States Supreme Court be subject to the following conditions:

- 1) The parties agree that any Notice of Appeal be filed in this Court within one week of the issuance of the appealable order; and
- 2) The party or parties appealing the case to the United States Supreme Court agree to file their jurisdictional statement or statements within thirty days of the filing of the Notice of Appeal.

The Plaintiffs would file a status report with this Court every 30 days until this continuance is lifted.

Counsel for both the Defendant and both Defendant-Intervenors concur in this motion, and have signed below.

A proposed order is attached.

Respectfully submitted,

# **EXHIBIT 3**

**Yeager, Jay**

---

**From:** Spies, Charles R. <cspies@clarkhill.com>  
**Sent:** Friday, January 18, 2019 8:55 AM  
**To:** Yeager, Jay; mbrewer@goodmanacker.com  
**Cc:** Jason Torchinsky  
**Subject:** Notice of Material Misstatement in Plaintiffs' response to Intervenor's motion for stay

Mssrs. Yeager & Brewer,

We have reviewed Plaintiffs' response to Intervenor's motion for stay. In it, you make the knowingly false statement that "On January 10, 2018, the undersigned counsel notified Intervenor's counsel of the beginning of a settlement discussion and asked whether Intervenor was interested in a settlement. They have not chosen to participate in the discussion."

As you know, Intervenor *never* declined to "participate in the discussion." You raised the potential for such a dialogue - contingent to discussion of redrawing legislative lines - and we stated that we needed to consult with our legislative clients first. It now appears that you went on to engage in clandestine discussions with Secretary Benson about a potential resolution without our knowledge or invitation to join such discussions.

You misled the Court by stating that we affirmatively chose not to engage in these discussions. It is your professional obligation to notify the Court of this material misrepresentation in your brief and correct the record.

Please submit such a notice immediately.

- Charlie

**Charles R. Spies**

CLARK HILL PLC  
1001 Pennsylvania Avenue NW Suite 1300 South | Washington, D.C. 20004  
202.572.8663 (Direct) | 202.572.8683 (Fax) | 202.957.6847 (Cell)  
[CSpies@ClarkHill.com](mailto:CSpies@ClarkHill.com) | [www.clarkhill.com](http://www.clarkhill.com)

*This email message and any attachments are confidential and may be privileged. If you are not the intended recipient, please notify us immediately by reply email and destroy all copies of this message and any attachments. Please do not copy, forward, or disclose the contents to any other person. Thank you.*

# **EXHIBIT 4**

**Yeager, Jay**

---

**From:** Yeager, Jay  
**Sent:** Friday, January 18, 2019 11:02 AM  
**To:** Spies, Charles R.  
**Cc:** Jason Torchinsky; Scott R. Eldridge (eldridge@millercanfield.com); mbrewer@goodmanacker.com  
**Subject:** Your message of this morning regarding statements to the Court

Charlie –

Your allegation of this morning is incorrect. Your misstate what was said in actual our filing, which was accurate and was consistent with the conversations among counsel. We did not, as you claim, tell the Court that Intervenor had “declined” to participate. We said that Intervenor had “not chosen” to participate in a discussion. If that is incorrect and Intervenor have in fact accepted our invitation to participate, extended on the 1/10 call and noted again on the 1/11 call, I am unaware of it and so are my colleagues. If Intervenor now choose to join a settlement discussion, please let us know what they would suggest by way of settlement. (I shared my suggested structure with Jason on 1/10.)

Moreover, in view of our repeated but unaccepted invitation to engage in settlement discussions, it would be badly misleading to call the settlement discussions “clandestine” as you do in your email.

If after fully considering the facts Intervenor still want to claim the Court has been misled please advise and explain in light of the foregoing, and we will hash this out fully with the Court when we see it on Tuesday.

I would also be happy to discuss this by telephone if you think that would be helpful.

Jay

**Jay Yeager**

***Senior Counsel***

[jay.yeager@FaegreBD.com](mailto:jay.yeager@FaegreBD.com) Download vCard

D: +1 317 237 1278

**Faegre Baker Daniels LLP**

300 N. Meridian Street | Suite 2700 | Indianapolis, IN 46204, USA

# **EXHIBIT 5**

**Yeager, Jay**

---

**From:** Spies, Charles R. <[cspies@clarkhill.com](mailto:cspies@clarkhill.com)>  
**Sent:** Friday, January 18, 2019 5:39 PM  
**To:** Yeager, Jay <[Jay.Yeager@faegrebd.com](mailto:Jay.Yeager@faegrebd.com)>  
**Cc:** Jason Torchinsky <[jtorchinsky@hvit.law](mailto:jtorchinsky@hvit.law)>; Scott R. Eldridge ([eldridge@millercanfield.com](mailto:eldridge@millercanfield.com))  
<[eldridge@millercanfield.com](mailto:eldridge@millercanfield.com)>; [mbrewer@goodmanacker.com](mailto:mbrewer@goodmanacker.com)  
**Subject:** Re: Your message of this morning regarding statements to the Court

Jay –

Thanks for the prompt reply, but I have conferred with my colleagues who were on the call with you on the 11<sup>th</sup> (and with Jason who spoke with you on the 10<sup>th</sup>) and your representations here are simply incorrect.

In your filing yesterday you stated that “On January 10, 2018, the undersigned counsel notified Intervenor’s counsel of the beginning of a settlement discussion and asked whether Intervenor’s were interested in a settlement. They have not chosen to participate in the discussion.”

In fact, on calls with Jason on the 10<sup>th</sup> and multiple attorneys on the 11<sup>th</sup> you referenced the idea of our clients agreeing to settlement (including the re-drawing of legislative lines) as a possible condition for Plaintiffs consenting to a stay of the trial. We replied that our legislative clients would need more than the proposed 24 hours in order to evaluate that offer, and absent your consent we proceeded with filing our Motion to Stay on Friday the 11<sup>th</sup> in order to meet the necessary timelines.

Importantly, when we inquired as to whether the Secretary of State defendant agreed with your “settlement discussions as a condition to consenting to the stay” proposal, you stated that you had not discussed the proposal and/or gotten an answer from her.

At no time did you ask if our clients were interested in settlement (absent as a condition for your consent to a stay) and at no point did you ask if our clients were interested in participating



in a settlement discussion. We can not decline to participate in something that was never offered.

In your reply to my e-mail this morning you appear to be doubling down on the falsehoods. There was never even one invitation to engage in settlement discussions, much less a "repeated" invitation. In contrast, your last representation to us was that there were no such discussions. Now, just six days later, you represented to the Court that your clandestine (i.e. not admitted to Intervenor Defendants) discussions with the Secretary of State Defendant are so far along that the Court could set a hearing on your proposed consent decree (presumably a complex document resulting from such settlement discussions) in just a few weeks.

Consequently, we again request that you correct the material misrepresentation in your filing with the Court.

And once that is corrected, if you consider your e-mail today to now be an actual invitation to engage in settlement, then please provide the status of current discussions with Defendant SOS, and what the parameters of her referenced consent decree are. With that information, our clients will then be able to make an educated decision whether to participate in such discussions.

- Charlie

**Charles R. Spies**

CLARK HILL PLC

202.572.8663 (Direct) | 202.572.8683 (Fax) | [202.957.6847](tel:202.957.6847) (Cell)

Sent from my iPhone

On Jan 18, 2019, at 11:01 AM, Yeager, Jay <[Jay.Yeager@faegrebd.com](mailto:Jay.Yeager@faegrebd.com)> wrote:

Charlie –

Your allegation of this morning is incorrect. Your misstate what was said in actual our filing, which was accurate and was consistent with the conversations among counsel. We did not, as you claim, tell the Court that Intervenor had “declined” to participate. We said that Intervenor had “not chosen” to participate in a discussion. If that is incorrect and Intervenor have in fact accepted our invitation to participate, extended on the 1/10 call and noted again on the 1/11 call, I am unaware of it and so are my colleagues. If Intervenor now choose to join a settlement discussion, please let us know what they would suggest by way of settlement. (I shared my suggested structure with Jason on 1/10.)

Moreover, in view of our repeated but unaccepted invitation to engage in settlement discussions, it would be badly misleading to call the settlement discussions “clandestine” as you do in your email.

If after fully considering the facts Intervenor still want to claim the Court has been misled please advise and explain in light of the foregoing, and we will hash this out fully with the Court when we see it on Tuesday.

I would also be happy to discuss this by telephone if you think that would be helpful.

Jay

Jay Yeager

*Senior Counsel*

[jay.yeager@FaegreBD.com](mailto:jay.yeager@FaegreBD.com) [Download vCard](#)

D: +1 317 237 1278

**Faegre Baker Daniels LLP**

300 N. Meridian Street | Suite 2700 | Indianapolis, IN 46204, USA

*This email message and any attachments are confidential and may be privileged. If you are not the intended recipient, please notify us immediately by reply email and destroy all c*